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October 19, 1999

By Overnight Mail, In Triplicate

United States Department of Transportation
Docket No. FAA-1999-6001 - 36
400 Seventh Street S.W.
Room Plaza 401
Washington, DC 20590

Re: In the Matter of Protection of
Voluntarily Submitted Information

Ladies and Gentlemen:

The New York Times, a national newspaper of general circulation with a demonstrated commitment to coverage of air safety issues, respectfully submits these comments on the Notice of Proposed Rulemaking published in the Federal Register (64 FN 40471) on July 26, 1999 in Notice No. 99-14 entitled "Protection of Voluntarily Submitted Information/ The proposed rule is to be published at 14 CFR § 193. The deadline for comments has been extended to November 4, 1999.

The proposed rule implements 49 U.S.C. § 40123. That statutory provision prohibits disclosure of "voluntarily-provided safety or security related information" where the administrator of the Federal Aviation Administration finds that disclosure would inhibit voluntary provision of that type of information, that receipt of that type of information aids in fulfilling the administrator's safety and security responsibilities and withholding such information would be consistent with those responsibilities.

The proposed rule implements the statutory provision too broadly, fails to take sufficient account of the public's interest as reflected, among other places, in the Freedom of Information Act, and is surprisingly paternalistic. The proposed rule gives parties submitting information to the FAA entirely too much discretion in deciding what they wish to keep secret and a similar excess of discretion to the FAA itself in deciding when and how nevertheless to disclose the information submitted. The only interested parties left entirely without the ability even to know or predict what sorts of information will be kept secret are the press and public.

We urge the following revisions to the proposed rule.

1. In Section 193.3, the term "voluntary" is defined to mean "information [that] was submitted without mandate or compulsion and not as a condition of doing business with the government." We would limit "voluntarily-provided information" to information that cannot be otherwise obtained. The universe of such information must necessarily be quite limited given the FAA's regulatory power.

2. The assessment of whether disclosure of "voluntarily-provided information" would "inhibit" the FAA's ability to obtain further information is almost entirely standardless. The Notice of Proposed Rulemaking states that "[t]he FAA anticipates that this normally would be based in part on statements from the aviation community that they are unwilling to provide the information unless the protections of § 40123 are insured." No other specific standards are noted. The Notice goes on to interpret the term "inhibit" awfully broadly. The notice states that "the FAA interprets 'inhibit' to mean to discourage or to repress or to restrain, but not to mean prevent the provision of information." We urge the FAA to issue regulations containing objective standards on both points. It should state the criteria (beyond the information provider's assertion) for the presumably limited circumstances in which disclosure of information would inhibit the provision of further information, and it should interpret "inhibit" in a way that is objectively verifiable.

3. The regulations give far too little weight to the public's legitimate interest in assessing safety and

security issues based on whatever criteria it deems appropriate. Although Section 40123(a)(2) expressly allows disclosure where that "would be consistent with the Administrator's safety and security responsibilities," including his or her responsibility to inform the public, the proposed regulations do not address this aspect of the Administrator's responsibilities at all. To the contrary, the Notice quotes a snippet of legislative history seeming to argue in favor of secrecy on the ground that information released to an unsophisticated public may "be misinterpreted, misunderstood, or misapplied." That may be so, but allowing the public to make the determinations it sees fit on such grounds as it sees fit is the very basis of our democracy. It is unbecoming paternalism to assert otherwise.

For these reasons, The New York Times respectfully urges the FAA to limit its extremely broad regulatory interpretation of 49 U.S.C. § 40123 in the ways discussed above.

Sincerely,

A handwritten signature in black ink, appearing to read "AL", is written over the word "Sincerely,".

Adam Liptak

/bc

cc: Mr. Matthew L. Wald
Rebecca Daugherty, Esq.
Carol Melamed, Esq.
Charles Tobin, Esq.